IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLYN WILSON	:	**CIVIL ACTION**
	:	
v.	:	
	:	
U.S. AIR EXPRESS	:	**NO. 98-1190**

M E M O R A N D U M

WALDMAN, J. **September 15, 1999**

I. Background

This is an employment discrimination action. Plaintiff has asserted claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. ("Title VII"). She has alleged that defendant subjected her to disciplinary action and ultimately terminated her employment because of her race.

Defendant asserts that plaintiff was terminated because of a history of attendance problems, degenerating job performance and a public altercation with another employee in violation of company policy regarding violence, threats of violence and acts that discredit defendant in the eyes of the public. Defendant has filed a motion for summary judgment which plaintiff has not opposed.

II. Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." See Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. Id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which she bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or conclusory allegations, such as those found in the pleadings, but rather must present competent evidence from which a jury could reasonably find in her favor. See Anderson, 479 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995). Even when the non-movant declines to respond, the court will evaluate the merits of the

motion and determine whether on the record presented the movant is entitled to summary judgment. See Custer v. Pan American Life Insurance Co., 12 F.3d 410, 416 (4th Cir. 1993); Anchorage Assoc. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 175 (3d Cir. 1990); Ganci v. Borough of Jenkintown, 1998 WL 175881, *2 (E.D. Pa. Apr. 14, 1998).

III. Facts

From the evidence of record, as uncontroverted or otherwise viewed in the light most favorable to plaintiff, the pertinent facts are as follow.

Plaintiff is an African-American female. She was employed in early 1994 as a Customer Service Agent ("CSA") with defendant Allegheny Airlines, Inc., a regional affiliate of USAirways, Inc. doing business under the name "U.S. Air Express."

As a CSA, plaintiff was responsible for "checking in" ticketed passengers, boarding passengers onto buses for transport to the appropriate aircraft and handling customer questions. In defendant's six-month and annual employee evaluations of plaintiff, she received performance ratings of average or above-average. From April 20, 1994 through the remainder of 1994, plaintiff was documented as late for work twenty-five times. From March through May of 1995, plaintiff was documented as late

an additional thirteen times. Plaintiff admits to each of the documented instances of tardiness.[1]

Plaintiff's six-month employee evaluation included a notation that she was "[l]ax in reporting to work on time" and that her performance in that area "need[ed] improvement." Plaintiff also acknowledges, and the record documents, that her attendance did not improve. Plaintiff received written reprimands for pervasive tardiness, referencing past verbal warnings she had received.

Plaintiff's first written warning was given by a white shift manager, Linda Jarman Cline, on October 5, 1994. Plaintiff was suspended that day for arriving twenty-five minutes late for a shift she was covering for another employee as part of a shift exchange or so-called "swap."

On November 29, 1994, Plaintiff again was warned in writing about her record of tardiness, this time by another white shift manager, Dick Wildoner. This official "Employee Consultation Form" indicated that time cards showed plaintiff was more than ten minutes late for work eight times in the previous two weeks, referenced the October suspension and warned that continued attendance problems could result in further disciplinary action.

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[1] As with all other CSAs, plaintiff's time was kept by punching in and out on a mechanical time clock.

Plaintiff’s attendance subsequently improved for a brief period of time. She arrived timely for work for each of her assigned shifts during the following three months. On January 10, 1995, however, she failed to show for a "swap" shift. She received a written warning for her absence and shift manager Jarman suspended her "swap" privileges for thirty days. The Employee Consultation Form regarding this no-show without notice also stated that any further infraction would warrant more severe disciplinary action including possible termination.

Following her general improvement in attendance, plaintiff received a positive rating for promptness in her annual employee evaluation. Shortly thereafter, however, plaintiff lapsed into her past pattern of tardiness. She reported late for work thirteen times during the next three months. Plaintiff received an Employee Consultation Form on May 12, 1995 for tardiness in reporting to a "swap" shift assignment. In the written reprimand, passenger service supervisor ("PSS") Edward Elder noted plaintiff’s history of attendance problems, warned her that such continued conduct could result in termination and suspended her "swap" privileges for sixty days. As with the other written reprimands, plaintiff admits to the documented conduct.

Plaintiff also began to encounter difficulty in performing some of her assigned duties. During a "push" on

March 31, 1995, plaintiff and a white male CSA, Ed Amarhanov, were working together at a boarding gate.[2] Plaintiff and Mr. Amarhanov mistakenly boarded an elderly couple onto a bus that transported them to the incorrect aircraft. A white shift manager, Frank Oley, reprimanded both plaintiff and Mr. Amarhanov in an Employee Consultation Form. They complained to station manager Les Price, a white male and the highest ranking manager at defendant's Philadelphia location, that the reprimand was inappropriate since they had not received prior notice that an Employee Consultation Form might be issued for boarding passengers onto the wrong flight. Mr. Price agreed to remove the forms from their files. He then issued a memo to all CSAs addressing the issue and outlining the consequences, including written reprimand, of future boarding errors. Plaintiff acknowledges these events and having received the memo.

On May 12, 1995, the same day that she was reprimanded for arriving late for a "swap" shift, plaintiff again made a boarding error during a "push." She boarded three non-English speaking passengers onto an incorrect flight. Plaintiff was suspended for the remainder of her shift and received an Employee Consultation Form reprimanding her for the boarding error. Plaintiff's white co-worker at the same door, CSA Sherrie

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[2] "Push" is a term used to refer to a brief hectic period in which a substantial number of planes land and take off.

McCulley, also received a written reprimand but was not suspended. Ms. McCulley had no prior record of a boarding error.[3]

On May 31, 1995, plaintiff was involved in an altercation with Kristie Masters, a white CSA, in front of passengers and other employees. Following a disagreement about the status of a particular flight, Ms. Masters referred to plaintiff as "stupid." Plaintiff responded by calling CSA Masters a "slut," threatening to "mop up the floor" with her and stating that Ms. Masters had "slept [her] way" through her employment in Boston and was now doing the same in Philadelphia. Ms. Masters did not respond to plaintiff's threats and accusations, but withdrew from the situation.

Plaintiff and Ms. Masters were provided an opportunity to explain the occurrence to shift manager Richard Wildoner and three passenger service supervisors. Plaintiff explained the altercation from her perspective. Ms. Masters chose to remain silent. Defendant then requested and received written statements regarding the incident from plaintiff and Ms. Masters.

Upon consideration of these statements and the prior disciplinary records, on June 8, 1995 Mr. Price terminated

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[3] Plaintiff also acknowledges that CSA McCulley may have been spared a shift suspension because, unlike plaintiff, she had completed her scheduled shift by the time she was reprimanded.

plaintiff's employment and suspended Ms. Masters for two days without pay. Mr. Price found Ms. Masters to be less culpable, and, unlike plaintiff, she did not have a substantial disciplinary history. She had previously received only one documented verbal warning.

Pursuant to her rights as an employee, plaintiff requested a hearing before defendant's grievance board.[4] The grievance board consisted of two members of management, PSS Mary Beth Graham and PSS Kelly Kanuch, both white, and two co-workers, a black CSA, Denise Dove, and a Latina CSA, Jessica Mnamo.[5] The grievance board heard from plaintiff, who at no time denied any of the behavior alleged regarding the altercation with Ms. Masters or her disciplinary history, and from a member of management who presented the rationale underlying the decision to terminate plaintiff's employment. The grievance board also considered a written statement of a black CSA who witnessed the altercation and two personal references provided for plaintiff by other employees. The grievance board voted to uphold plaintiff's termination.

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[4] Plaintiff could have requested a grievance board review of any of her prior discipline, but chose not to do so.

[5] Also present was Michelle Grayhill, a white Human Resources department employee, for the purpose of breaking a tie vote. It was unnecessary for her to do so and she thus did not vote on plaintiff's termination.

Plaintiff subsequently filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC concluded that defendant had not discriminated against plaintiff and issued a right to sue letter on December 4, 1997. On March 5, 1998, plaintiff filed the instant action.

IV. Discussion

A plaintiff may sustain a claim of employment discrimination with direct or indirect evidence. See Torre v. Casio, Inc., 42 F.3d 825, 829 (3d Cir. 1994). Direct evidence is overt or explicit evidence which directly reflects a discriminatory bias by a decisionmaker. See Armbruster v. Unisys Corp., 32 F.3d 768, 778, 782 (3d Cir. 1994) (analogizing direct evidence to the proverbial "smoking gun"). Indirect evidence is evidence of actions or statements from which one may reasonably infer discrimination. See Torre, 42 F.3d at 829. The summary judgment record contains no direct evidence of discrimination.

In the absence of direct evidence, a plaintiff may proceed under the burden shifting McDonnel Douglas analysis. See Simpson v. Kaye Jewelers, Div. of Serling, Inc., 142 F.3d 639, 643-44 (3d Cir. 1998); Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995), cert. denied, 515 U.S. 1159, (1995).

To establish a prima facie case, a plaintiff must show that she is a member of a protected class, that she was qualified for the position from which she was discharged or otherwise

suffered an adverse employment action, and that other employees not in the protected class were treated more favorably. See Pivirotto v. Innovative Systems, Inc., 1999 WL 689961, *5 (3d Cir. Sept. 7, 1999); Josey v., John R. Hollingsworth Corp., 996 F.2d 632, 638 (3d Cir. 1993); Jackson v. University of Pittsburgh, 826 F.2d 230, 233 (3d Cir. 1987), cert. denied, 484 U.S. 1020 (1988).

Once a plaintiff has presented a prima facie case, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the adverse employment decision. Simpson, 142 F.3d at 644 n.5. The plaintiff may then discredit the employer's articulated reasons and show they are pretextual from which one may infer the real reason was discriminatory or otherwise present evidence from which one reasonably could find that unlawful discrimination was more likely than not a determinative or "but for" cause of the adverse employment action. Id. at 644 n.5; Miller v. CIGNA Corp., 47 F.3d 586, 595-96 (3d Cir. 1995) (en banc).

To discredit a legitimate reason proffered by the employer, a plaintiff must present evidence demonstrating such weaknesses, implausibilities, inconsistencies, contradictions or incoherence in that reason that one reasonably could conclude it is incredible and unworthy of belief. Simpson, 142 F.3d at 644; Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994); Ezold v.

Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1993). A plaintiff does not discredit the employer's proffered reason merely by showing that the adverse employment decision was mistaken, wrong, imprudent, unfair or even incompetent. See Fuentes, 32 F.3d at 765 ("to discredit the employer's proffered reason, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is 'wise, shrewd, prudent or competent'"); Hicks v. Arthur, 878 F. Supp. 737, 739 (E.D. Pa.) (that decision is ill-informed or ill-considered does not make it pretextual), aff'd, 72 F.3d 122 (3d Cir. 1995); Doyle v. Sentry Ins., 877 F. Supp. 1002, 1009 n. 5 (E.D. Va. 1995) (relevant issue is perception of decision maker); Orisakwe v. Marriott Retirement Communities, Inc., 871 F. Supp. 296, 299 (S.D. Tex. 1994) (employer who wrongly believes there is legitimate reason to terminate employee does not discriminate when he acts on that belief).

The ultimate burden of proving that a defendant engaged in intentional discrimination remains at all times on the plaintiff. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507, 511 (1993).

Plaintiff is a member of a protected class. She suffered adverse employment action. She was treated less

favorably than some white employees who committed infractions and were not discharged.[6] It is difficult to conclude from the competent evidence of record that plaintiff was qualified for the job she held.

A plaintiff who has failed to perform her job adequately is unqualified for her position and cannot make out a prima facie case of discrimination. See Spangle v. Valley Forge Sewer Authority, 839 F.2d 171, 173-74 (3d Cir. 1988). The ability to attend work on a regular basis is an essential prerequisite of employment. See Tyndall v. National Educ. Centers, Inc. of Cal., 31 F.3d 209, 213 (4th Cir. 1994); Carr v. Reno, 23 F.3d 525, 529 (D.C. Cir. 1994)(predictable nature of arrival time is "essential function" of employment); Santiago v. Temple Univ., 739 F. Supp. 974, 979 (E.D. Pa. 1990)(dependable attendance is fundamental prerequisite to job qualification), aff'd 928 F.2d 396 (3d Cir. 1991). Plaintiff admits to thirty-eight documented late arrivals to work and a failure to show for

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[6] Defendant asserts with some force that plaintiff was not similarly-situated to her co-workers because of the substantial difference in disciplinary records. The difference in disciplinary histories, however, is more appropriately addressed in the context of plaintiff's burden to show pretext rather than her burden to establish a prima facie case. See Jackson, 826 F.2d at 233; Bellissimo v. Westinghouse Electric Corp., 764 F.2d 175, 179 (3d Cir. 1985)(proof of discharge sufficient to establish prima facie showing of less favorable treatment in Title VII suit), cert. denied, 475 U.S. 1035 (1986).

a "swap" shift, as well as errors in boarding passengers and misconduct in her altercation with Ms. Masters.

Even accepting that plaintiff can establish a prima facie case, defendant has presented legitimate nondiscriminatory reasons for the discipline and discharge of plaintiff and she has neither discredited those reasons or otherwise shown that race was more likely than not a determinative factor in defendant's decisions.

Defendant's expectations regarding attendance, performance and behavior are documented in the Allegheny Airlines Employee Handbook which plaintiff received and agreed to abide by when she began working for defendant.[7] Plaintiff admitted that she failed to meet defendant's expectations regarding attendance, performance and behavior. Defendant undertook an incremental series of disciplinary actions for misconduct which plaintiff does not dispute, ultimately ending in termination after the unseemly public incident with Ms. Masters.

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[7] Defendant's employee handbook detailed the company's general employee policies including its prohibition of racial discrimination, attendance and punctuality requirements, expectations regarding appropriate employee behavior and a progressive discipline policy governing violations of company policy. The handbook prohibited "excessive absenteeism or any absence without notice," "fighting or threatening violence," "boisterous or disruptive activity" and "discrediting [defendant] in public through actions or statements." It alerted employees to the progressive discipline policy including verbal warnings, written reprimands, suspensions and terminations, to be applied in light of the circumstances and past disciplinary history.

Plaintiff testified that she believes she was disciplined more severely than white employees for similar misconduct and was terminated as a result of misconduct for which white employees were not terminated. Plaintiff, however, has produced no competent evidence to support her belief.[8] Subjective beliefs, rumor and speculation cannot substitute for evidence. See, e.g., Sharon v. Yellow Freight System, Inc., 872 F. Supp. 839, 847 (D. Kan. 1994)(plaintiff's personal belief not sufficient to create genuine issue of material fact concerning differential treatment), aff'd, 107 F.3d 21 (10th Cir. 1997).

Plaintiff has presented no competent evidence that there were any employees with attendance records as deficient as hers. Rather, it is uncontroverted that plaintiff's attendance record was by far the worst among all of defendant's employees. Plaintiff was not disciplined at all for her first fifteen late arrivals. No other employee had accumulated this many late arrivals. Thus, any discipline against other employees for arriving late would appear to be less favorable treatment than that accorded plaintiff.

Plaintiff testified that white employees engaged in a practice of punching time cards of fellow white employees to

[8] As plaintiff has submitted nothing in opposition to the summary judgment motion, the court necessarily has attempted to discern her contentions from her deposition testimony which defendant has submitted in its entirety.

avoid discipline for attendance misconduct. This testimony, however, was largely based on hearsay, rumor and speculation. Plaintiff herself only twice witnessed someone punching a time card of a co-worker and she admits having no knowledge or competent evidence of the race of the other employees. Moreover, there is no competent evidence of record that defendant failed to take disciplinary action against any employee, of any race, known by management to have misused the time clock.

Plaintiff testified that white employees misused defendant's passenger bus without consequence by requesting that friends pick them up at the employee parking area to transport them to the terminal rather than use the employee bus. Plaintiff acknowledged, however, that she has no competent evidence that any such misuse of the passenger bus was limited to white employees or that any non-white employee was or would be disciplined for such use of the passenger bus.

It is uncontroverted that CSA Amarhanov was disciplined in the same manner as plaintiff for the boarding error committed when they worked together. It is uncontroverted that several other CSAs, most of whom were white, were reprimanded for boarding errors made during the same period of time as were plaintiff and Mr. Amarhanov. Plaintiff was disciplined more severely than CSA McCulley for the boarding error on May 12,

1995, but it is uncontroverted that Ms. McCulley had no previous record of making a boarding error.

In her deposition, plaintiff speculates that her time card was audited while white employees' time cards were not. Plaintiff produces absolutely no competent evidence of such a disparity in treatment.

Plaintiff testified that a white employee was not terminated for conduct similar to her altercation with CSA Masters. Plaintiff refers to PSS Edward Elder who was not discharged after using a profane name with reference to Director of Stations Rick Schwartz. It is uncontroverted, however, that PSS Elder did not threaten Mr. Schwartz, that the comment was not made in public and that at the time, Mr. Elder had only a single disciplinary warning in his file.

The conduct of CSA Masters, who was suspended for two days without pay, was clearly less egregious and menacing than plaintiff's. Moreover, at the time of this incident plaintiff had an extensive record of performance deficiencies documented by several written reprimands, warnings of possible termination for continued misconduct, two swap privilege suspensions and two shift suspensions. CSA Masters had only a single verbal warning.

In her deposition, plaintiff also recounts several occurrences which she seems to believe show some racial motivation for her discipline and termination. Plaintiff notes that CSA Suzanne Stickel referred to plaintiff as a "tramp." She

recounts that CSA Masters and CSA Karen Vincent reportedly requested that they not be assigned to work any boarding assignment with plaintiff.[9] She recalled that CSA Masters signed plaintiff up for a "swap" shift without her permission and stated to other employees that she hated plaintiff. She states that CSA Donna Zikowitz reportedly had refused to provide employment applications to some black applicants.[10] She recounted that an unknown employee placed a fake mouse covered in fake blood in the employee break room.

Plaintiff has presented no competent evidence remotely to show that any comments or conduct by CSAs Stickel, Masters or Vincent were race-related. Workplace friction and acrimony are not uncommon. That such may occur among employees of different races, nationalities, religions or sexes does not without more import discriminatory animus. There is no evidence that Ms. Stickel, Ms. Masters or Ms. Vincent expressed negative personal feelings about black co-workers generally. Even assuming competent evidence that Ms. Zikowitz declined to give

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[9] Plaintiff stated that she had not actually heard the request but that it was relayed to her by CSA Cynthia Sparks. Plaintiff could not recall if CSA Sparks had claimed actually to have heard the request or if she heard about it from some other unknown source. In any event, there is no affidavit or testimony of record from Ms. Sparks to establish what may have occurred.

[10] This account also is based on hearsay. Plaintiff states that she was told by another employee, Beth Ireland, that "if [applicants] were black, sometimes Donna would bring the application out and sometimes she would not." No affidavit or testimony of Ms. Ireland has been submitted in this regard.

applications to some of the black applicants and this was related to race, there is no evidence that management acquiesced in such conduct. Plaintiff admits that the mouse incident was the sort of prank that employees played on one another. Plaintiff offers only her subjective belief that the referenced conduct must be racially motivated.

Moreover, there is no evidence that Ms. Stickel, Ms. Masters, Ms. Vincent, Ms. Zikowitz or the unknown employee who engaged in the fake mouse prank participated in any way whatsoever in the decisions to discipline and terminate plaintiff. Indeed, none of the identified individuals was a management employee and the evidence clearly documents the identity of the decisionmakers.

V. Conclusion

By her own admission, plaintiff's job performance was deficient and failed to satisfy the requirements of her employer. Defendant addressed plaintiff's admitted deficiencies and misconduct with graduated discipline and finally termination. Defendant contemporaneously and consistently articulated legitimate nondiscriminatory reasons for its actions. Defendant has not discredited those reasons or presented competent evidence from which one reasonably could find that race was any factor, let alone a determinative factor, in the decisions to discipline and terminate her. There is no competent evidence that any employee with a comparable record was treated more leniently.

One simply cannot reasonably conclude from the competent evidence of record that defendant engaged in intentional discrimination in the discipline or termination of plaintiff. Plaintiff has failed to sustain a claim of racial discrimination. Accordingly, defendant's motion will be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this day of September, 1999, upon consideration of defendant's Motion for Summary Judgment and in the absence of any response by plaintiff thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly **JUDGMENT is ENTERED** in the above action for the defendant and against the plaintiff.

BY THE COURT:

JAY C. WALDMAN, J.